QUESTION PRESENTED

Whether 40 U.S.C. 13k, which prohibits picketing, leafleting, and demonstrating in the Supreme Court building and on its grounds, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the United States, the appellants are Alfred Wong, Marshal of the Supreme Court of the United States; James Zagami, Chief, Supreme Court Police; and John H. Drexhagen, Officer, Supreme Court Police. The appellees are Mary Terese Grace and Thaddeus Zywicki. The Chief Justice was named as a defendant in the district court and as an appellee in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1863

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

MARY T. GRACE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 1a-49a) is reported at 665 F.2d 1193. The opinion of the district court (J.S. App. 56a-68a) is reported at 524 F.Supp. 815.

JURISDICTION

The judgment of the court of appeals (J.S. App. 50a-51a) was entered on September 8, 1981, and a petition for rehearing was denied on November 12, 1981 (J.S. App. 52a). A notice of appeal (J.S. App. 70a) was filed on December 11, 1981. On February

2, 1982, Justice Brennan extended the time for docketing the appeal to and including April 9, 1982. The appeal was docketed on April 7, 1982, and the Court noted probable jurisdiction on June 21, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1252. *Parker* v. *Levy*, 417 U.S. 733, 742-743 n.10 (1974).

STATUTORY PROVISIONS INVOLVED

40 U.S.C. 13k provides:

> It shall be unlawful to parade, stand, or move in processions or assemblages in the Supreme Court Building or grounds, or to display therein any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement.

18 U.S.C. 1507 provides:

> Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the United States, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than $5,000 or imprisoned not more than one year, or both.

STATEMENT

40 U.S.C. 13k prohibits the "display [of] * * * any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in the Supreme Court building or on its

grounds.[1] The Marshal of the Supreme Court, who supervises the Supreme Court police in their enforcement of Section 13k (see 40 U.S.C. 13n), interprets the statute to prohibit all picketing, leafleting, and demonstrating (J.S. App. 6a-7a n.7).

On three occasions between May 1978 and February 1980, appellee Zywicki stood on the Supreme Court grounds and attempted to distribute leaflets. One leaflet concerned the removal of unfit federal judges; the others discussed Central American politics (J.S. App. 3a-4a, 57a-58a). Each time, an officer of the Supreme Court police advised Zywicki that his conduct was prohibited, and he left the Supreme Court grounds. Appellee Grace learned of these events, and in March 1980 she stood on the Supreme Court grounds with a sign, approximately four feet by two and one-half feet, that recited the words of the First Amendment. She, too, left the grounds after being warned by a Supreme Court police officer (*id.* at 4a, 56a-57a). Two months later, appellees brought this action in the United States District Court for the District of Columbia, seeking a declaration that Section 13k is unconstitutional on its face and an injunction against its enforcement (J.S. App. 4a).

The district court dismissed appellees' complaint,[2] but a divided court of appeals reversed and held Section 13k unconstitutional on its face (J.S. App. 30a).

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[1] The Supreme Court grounds extend to the curb on each side of the square block on which the Court is situated. 40 U.S.C. 13p.

[2] The district court ruled that appellees had not exhausted their administrative remedies (J.S. App. 65a-68a). The government did not suggest this basis for decision to the district court and did not defend it in the court of appeals (see *id.* at 6a-7a).

The court of appeals stated that "whenever the Government denies freedom of expression on property generally open to the public, the restriction must be justified by a significant governmental interest—whether that interest derives from the very nature of the property itself, or from some other source" (*id.* at 19a). The court acknowledged that "[s]ubstantial governmental interests certainly * * * justify restrictions on picketing and other forms of expression in and near courthouses" (*id.* at 20a). It noted the need to protect against "influence or domination of the judiciary by public pressure," because "arguments to courts properly are presented in official pleadings * * * not on placards" (*id.* at 21a). Moreover, the court said, Congress may protect against the danger that the public will mistakenly believe a judge's decision to have been the result of popular pressure (*ibid.*).

Nevertheless, the court of appeals declared that it "need not determine the extent to which these concerns are applicable to proceedings before the United States Supreme Court" because "these legitimate concerns are fully addressed by 18 U.S.C. 1507" (J.S. App. 21a-22a). Section 1507 makes it illegal for any person to "picket[] or parade[] in or near a building housing a court of the United States, * * * or [to] resort[] to any other demonstration in or near any such building," but only if that person acts "with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing [a] judge, juror, witness, or court officer, in the discharge of his duty." The court of appeals noted (J.S. App. 23a) that the constitutionality of a state statute essentially identical to Section 1507 was upheld in *Cox* v. *Louisiana (Cox II)*, 379 U.S. 559, 560-566 (1965). Because of Section 1507,

the court of appeals could find no justification for 40 U.S.C. 13k.

The court of appeals dismissed the argument that Section 13k is a reasonable measure designed to preserve the dignity and decorum of the Nation's highest court. The court of appeals acknowledged that Congress specified this interest, in the legislative history, as a reason for enacting Section 13k and that this interest is not fully protected by Section 1507 (J.S. App. 23a). The court also acknowledged that "[u]nquestionably, the majesty of the Supreme Court building can and does instill public confidence in the important governmental functions conducted inside" (*id.* at 24a). But the court of appeals questioned whether such symbolic purposes could ever justify a regulation of expression (*ibid.*). The court then added that because "*all* expressive conduct outside the Supreme Court" could not be shown adversely [to] affect the peace and decorum of the Court," the government's interest in promoting those objectives was not sufficient to sustain Section 13k (J.S. App. 25a; emphasis in original).

The court of appeals also rejected the argument that Section 13k should be upheld because it permitted appellees to demonstrate in many other places near the Supreme Court (J.S. App. 25a). In the court's view, the availability of alternative forums was irrelevant to the constitutionality of Section 13k (J.S. App. 25a-26a).

The court of appeals said that it did not "suggest that any individual may picket or leaflet in the Supreme Court building itself" (J.S. App. 26a-27a). However, because of the "all-encompassing terms," the "decades of consistently broad enforcement," and the "slim legislative history" of Section 13k, the court refused to construe the statute more narrowly in order to avoid constitutional objections (J.S. App. 28a-

29a). The court concluded that because Section 13k "prohibits expressive conduct unrelated to any business of the Supreme Court throughout the Supreme Court grounds," it is "void on its face" (J.S. App. 27a).

Judge MacKinnon dissented from this holding. He reasoned that the activities proscribed by Section 13k would, if permitted, "create the impression * * * in the public's mind that the Supreme Court is embroiled in or affected by such street pressures and picketing. Our tripartite government has a strong interest in sheltering its judicial branch from the appearance of influence by political forces and all outside pressures" (J.S. App. 32a). Judge MacKinnon also questioned the majority's suggestion that the restriction imposed by Section 13k is excessive because it extends beyond matters pending before the Court; he noted that "the subject[s] of on-going public campaigns and movements" are frequently "potential judicial issues" that are likely to come before the Court at some time (J.S. App. 47a). Judge MacKinnon remarked that Section 13k and Section 1507 "serve the important and substantial governmental interest of maintaining 'order and decorum' for the entire Court area and preserving the 'appearance of justice' " (J.S. App. 45a) and for that reason are "complementary" (*id.* at 37a).

Three judges, stating that they agreed with Judge MacKinnon's dissent, voted in favor of rehearing en banc (J.S. App. 53a-55a).

SUMMARY OF ARGUMENT

40 U.S.C. 13k does not prohibit any person from speaking about any subject; it regulates only expressive conduct of a certain manner—public demonstra-

tions, picketing and leafleting—in a certain place, the one square block on which the Nation's highest court is located. The statute is constitutional because it is "justified without reference to the content of the regulated speech, * * * [it] serve[s] a significant governmental interest, and * * * in doing so * * * [it] leave[s] open ample alternative channels for communication'" (*Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

A. 1. Section 13k is unquestionably content-neutral. It does not refer to the content, subject-matter, or message of the speech it regulates, and appellees have made no showing that it is enforced in a discriminatory fashion.

2. a. Section 13k has no effect at all on the First Amendment rights of the one group of demonstrators who have a clear interest in being on the Court grounds—those who are addressing the Court in an effort to influence it. *Cox II* established, and the court of appeals conceded, that the Constitution gives such speakers no right to be on the Court grounds and that 18 U.S.C. 1507 constitutionally prohibits them from being near the Court.

Other speakers—those who are not directly addressing the Supreme Court—have less of an interest in being on the Court grounds, and Section 13k leaves them such abundant alternative means of expression that it is likely to have no significant effect on their speech. Section 13k regulates expression only in one square block; it leaves demonstrators free to go anywhere else in the vicinity of the Court, including

the sidewalk directly across the street and the streets themselves in front of the Court. A demonstration in those places is easily visible to persons on the Court grounds and is unlikely to attract less attention than a demonstration on the sidewalk in front of the Court. Similarly, even from across the street demonstrators are able to use the Court as a symbolic backdrop for their activities. If appellee Zywicki had distributed leaflets about unfit judges directly across the street from the Court, for example, or if appellee Grace had demonstrated against Section 13k while standing directly across the street from the Court, few would have mistaken their point.

In any event, a statute does not violate the Constitution merely because it may marginally diminish the impact of some speech; otherwise, few regulations of time, place, or manner would ever be permitted. Section 13k has none of the vices of the restrictions that this Court has invalidated in the past: it does not prohibit the use of an entire means of public expression; it does not make public expression unreasonably difficult for speakers with little money or for speakers pursuing certain causes; and because it allows demonstrations in areas easily visible from the Supreme Court grounds, it does not prevent speakers from reaching their desired audience.

b. The slight practical effect that Section 13k has on First Amendment rights is further diminished because the area near a courthouse is not a "public forum" in which citizens have traditionally claimed broad rights of assembly and public expression. *Cox II* establishes that the government has far greater latitude to prohibit expression on courthouse grounds

than it does on an ordinary street. Indeed, by upholding a statute prohibiting speech on courthouse grounds that was akin to a restriction based on content, *Cox II* establishes that the area near a courthouse—like, for example, a military base—is one in which a citizen's right of access for First Amendment purposes is at a minimum.

B. 1. As the court of appeals acknowledged, Section 13k promotes important government interests. First, it serves the interests identified in *Cox II* —protecting against both actual interference with the judicial process and the danger that the public will perceive an action by the Court to be a response to pressure exerted by demonstrators. Comparable interests are sufficient to justify even content-based restrictions on speech; a fortiori, these interests are sufficient to justify a neutral, narrow regulation like Section 13k.

The court of appeals apparently believed that these interests could not be advanced in support of Section 13k because they are also served by 18 U.S.C. 1507. But the Constitution does not prohibit Congress from enacting two statutes that address the same problem in overlapping ways. Moreover, the court of appeals was not correct in suggesting that Section 13k is excessively restrictive because, unlike Section 1507, it is not limited to actions done "with the intent of influencing" the Court.

The intent requirement in Section 1507 is designed to protect such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceeding, who just happen[s] to have an office located in the courthouse building" (*Cox II*, *supra*, 379 U.S. at 567). Because

Section 13k applies only to the Supreme Court building and grounds, which house only the Court and related offices, the principal reason for an intent requirement is inapplicable to Section 13k.

In any event, demonstrations that are not intended to influence the Court will not have significantly less impact if they are held across the street from the Court, or in the street in front of it. At the same time, limiting Section 13k to expressive activities intended to influence the Court would have significant costs. Some demonstrations may be *seen* as influencing the Court—and therefore, under *Cox II*, are properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court.

Perhaps more important, including a specific intent requirement in Section 13k "would actually increase opportunities for the content-based censorship disfavored by the First Amendment" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 1 (O'Connor, J., concurring)). Policemen, prosecutors, and jurors would unavoidably have considerable discretion in making the difficult judgment whether a demonstration was intended to influence the Court—as opposed to, for example, being intended to protest an earlier decision or to express the speakers' views on a social issue implicated by the Court's decisions. The content of the expression would often be the principal evidence of the speaker's intent. Under *Cox II*, this is not an unconstitutional measure of discretion to vest in officials when necessary to permit demonstrations that are directed at non-judicial officials who happen to be located in a courthouse building. But there is no

need to apply such a discretionary criterion to the Supreme Court grounds.

2. Section 13k also reflects a judgment by Congress that the dignity of the Supreme Court and the symbolic purposes it serves are incompatible with public demonstrations. Congress undoubtedly has the power to establish national monuments and to attempt in other ways to give symbolic meaning to certain public places; in the exercise of this power, as in the exercise of its other powers, Congress may place reasonable and appropriate restrictions on the place or manner of expression. For example, Congress surely has the power to restrict or even prohibit public demonstrations in a national cemetery in order to protect its symbolic character as a place that is tranquil and sacrosanct.

In enacting Section 13k, Congress treated the building and grounds of the Supreme Court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, informed by vigorous debate within the courtroom but immune from outside pressure and political controversy. Because of its constitutional status and its historic role, the Nation's highest court is a uniquely appropriate symbol of these values. No other building housing an operating institution of government is more emblematic of a process open to the orderly presentation of argument but free from the insistent popular pressure that demonstrators—properly, in other settings—represent. In view of Congress's undoubted power to create and define symbols, and the slight burden Section 13k imposes on speech, there is no basis for rejecting Congress's decision to give this symbolic stature to the Supreme Court.

ARGUMENT

40 U.S.C. 13k IS A PERMISSIBLE REGULATION OF THE PLACE AND MANNER OF EXPRESSION

A. Section 13k Is a Content-Neutral Regulation That Leaves Open Ample Alternative Means of Expression

1. This Court has " 'often approved restrictions [on expressive activities] * * * that * * * are justified without reference to the content of the regulated speech, that * * * serve a significant governmental interest, and that in doing so * * * leave open ample alternative channels for communication * * *.' " *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981), quoting *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104 (1971); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Cox* v. *New Hampshire*, 312 U.S. 569 (1941). See also *Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 535 (1980); *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

40 U.S.C. 13k is plainly a neutral regulation " 'applicable to all speech *irrespective of content*' " (*Carey* v. *Brown*, 447 U.S. 455, 470 (1980), quoting and adding emphasis to *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 209 (1975)). Section 13k does not refer to either the content or the subject matter of the expression it regulates; it bars all demonstrating and leafleting on the Supreme Court grounds, whatever the speaker's message. The Marshal of the Supreme Court stated in an affidavit filed in the district court that Section 13k "is enforced uniformly without regard to [the] message of the expressive conduct"

(Mot. to Aff. App. 38a). Neither the district court nor the court of appeals found any evidence of discriminatory enforcement.[3] Section 13k therefore presents no danger that "communication has * * * been prohibited 'merely because public officials disapprove the speaker's views.'" *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536, quoting *Niemotko* v. *Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring).

2. In addition, Section 13k imposes only a minimal burden on protected speech. It does not prohibit any person from speaking about any subject; it regulates only expressive conduct of a certain form—public demonstrations, picketing, and leafleting—in a certain place, the one square block on which the Court is located.[4]

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[3] In their Motion to Affirm, appellees repeatedly contend (*e.g.*, Mot. to Aff. 9, 10, 11-12, 19) that there is evidence of discriminatory enforcement of Section 13k and other statutes regulating activities on the Supreme Court grounds. But a claim of discriminatory enforcement presents a question of fact (see, *e.g.*, *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962)), and appellees never proved in the district court that Section 13k is enforced in a discriminatory fashion. In addition, the court of appeals specifically noted that it was deciding the constitutionality of Section 13k, even though the district court did not address that issue, only because that issue did not present any factual questions. See J.S. App. 9a n.9 ("[S]ince [appellees] challenge the constitutionality of § 13k on its face, the resolution of this issue is purely one of law, appropriate for appellate review."). See also J.S. App. 36a n.3 (MacKinnon, J., dissenting) ("Since the majority has treated this case as raising the issue only of the facial construction of § 13k, I will limit my remarks similarly.").

[4] The court of appeals repeatedly referred to Section 13k as an "absolute prohibition of expression," because of which "First Amendment rights * * * [can] never be exercised in

One category of demonstrators—those who are addressing the Court and attempting to influence it—may attach particular significance to this location. They may wish to be as close to the Court as possible in order to make the Court aware of their presence and numbers. But *Cox II* established, and the court of appeals conceded (J.S. App. 22a-23a), that the Constitution gives such speakers no right whatever to be on the Court grounds, and 18 U.S.C. 1507 constitutionally prohibits them from being near the Court. Section 13k therefore has no effect on the First Amendment rights of those who have the clearest reason for wanting to demonstrate on the Supreme Court grounds.

Other speakers—those whose message is unrelated to the work of the Court—also are prevented by Section 13k from engaging in expressive activities in the immediate vicinity of the Court, but such persons have far less of an interest in being on the Court grounds, and it seems unlikely that a one-square-block restriction will affect the impact of their speech. Section 13k leaves them ample alternatives; they are free, for example, to leaflet and picket across the street from the Court. Moreover, subject only to local District of Columbia regulations that appellees do not challenge, demonstrators may parade on the streets directly in front of the Court. D.C. R. & Regs. tit. 35, § 107 (1970); D.C. Mun. Regs. tit. 35, §§ 1.1-1.6 (1975).

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any form" on the Supreme Court grounds (J.S. App. 26a). See *id.* at 2a, 20a, 23a, 24a, 25a, 27a, 28a, 29a. This is of course incorrect; Section 13k does not, for example, prohibit private discussions among persons properly on the Court grounds, nor, obviously, does it prohibit the vigorous presentation of legal argument in the Court.

A demonstration across the street from the Court, or on the street in front of the Court, is easily visible to persons on the Supreme Court grounds; in all probability, it attracts no less attention than a demonstration on the sidewalk in front of the Court. Similarly, demonstrators who consider the Supreme Court grounds to be the most appropriate symbolic backdrop for their activities are able, even from across the street, to use the Court as a background and to take advantage of the connotations of its proximity. If appellee Zywicki had distributed leaflets about unfit judges directly across the street from the Court, for example, or if appellee Grace had chosen that site for her demonstration against Section 13k, few passers-by would have mistaken their point.

But even if Section 13k does marginally diminish the impact of some protected speech—if, as the court of appeals suggested (J.S. App. 24a), a leafleter encounters fewer people across the street from the Court, or if demonstrators consider the symbolic aspects of their expression impaired by using the street in front of the Court instead of the Court grounds—that would not be sufficient to render Section 13k unconstitutional. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, 453 U.S. 114, 134-135 (1981) (Brennan, J., concurring). This Court has repeatedly upheld restrictions that reduced a speaker's audience or the impact of his expression in some way, because the alternatives were "ample" and the regulation did not discriminate on the basis of content. See, *e.g.*, *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 654-655; *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Kovacs* v. *Cooper*, *supra*, 336 U.S. at 87-88 (opinion of Reed, J.); *Cox* v. *New Hampshire*, *supra*, 312 U.S.

at 574. See also *Cox* v. *Louisiana* (*Cox I*), 379 U.S. 536, 554-555 (1965).[5] Scarcely any regulation in this area could be sustained if the First Amendment gave every speaker an absolute right to speak at the time and place, or in the manner, that attracts the largest audience or the most attention.

In addition, Section 13k has none of the characteristics that have prompted this Court to invalidate restrictions on expression in the past. For example, unlike a prohibition on leafleting in all of a city's streets (see *Schneider* v. *State*, 308 U.S. 147 (1939)), Section 13k does not sharply reduce the speaker's audience, or make it unduly difficult or expensive for a speaker to reach members of the general public. Because Section 13k allows demonstrators and leafleters to go near

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[5] The court of appeals attempted to distinguish these cases on the ground that they involved only a regulation of the time, place, or manner of expression within an area; Section 13k, the court said, "does not merely limit the area of the Supreme Court grounds available for expressive conduct [but] * * * absolutely prohibits all expressive conduct throughout the grounds" (J.S. App. 26a n.20; see also Mot. to Aff. 19). But the legality of a regulation must depend on its actual impact on protected rights, not on an arbitrary definition of the relevant area. Here, for example, if the relevant forum is defined as the vicinity of the Supreme Court (or as the public places of Washington, D.C.), Section 13k does "merely limit the area * * * available for expressive conduct" and does not prohibit demonstrations throughout the forum.

Moreover, as we discuss (pages 17-21, *infra*), the Supreme Court grounds themselves are not properly treated as a "public forum" in which the government's power to regulate expressive activities is strictly limited, and within the Supreme Court grounds the government has exceptionally strong interests in regulating speech and may impose a more complete restriction than it could place on expression in the streets and public places generally (see pages 21-39, *infra*).

the Supreme Court grounds, where they are likely to be noticed by persons entering or leaving the grounds, it does not even "ha[ve] the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate" (*United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring)) in the way that, for example, a ban on picketing residences would prevent speakers from reaching those who live in a particular neighborhood (see *Carey* v. *Brown*, *supra*, 447 U.S. at 468-469 n.13).[6] Similarly, Section 13k does not bar a means of communication that is "essential to the poorly financed causes of little people" (*Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943) (absolute prohibition on house-to-house solicitation)). And contrary to the court of appeals' suggestion (J.S. App. 24a-25a), Section 13k does not implicitly invite members of the public to ignore dissidents by allowing expression "only in an area that a benevolent government has provided as a safe haven for crackpots" (*Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 513 (1969)); Section 13k leaves demonstrators free to choose a site for their expressive activity anywhere in the vicinity of the Supreme Court, and there is no reason to believe that they will be taken less seriously because they are not on the same square block as the Court itself.

Finally, the practical effect Section 13k has on expression, if any, is of diminished constitutional significance because, under this Court's decisions, the area immediately surrounding a courthouse is not a "public forum"—a place to which citizens may freely

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[6] We note that in neither *Carey* (see 447 U.S. at 459 n.2) nor *O'Brien* did the Court hold that a measure that had such an effect would be unconstitutional.

gain access for public demonstrations, and in which the government's power to regulate expressive activities is limited. See Kalven, *The Concept of the Public Forum: Cox* v. *Louisiana*, 1965 Sup. Ct. Rev. 1. While the Court has not always used the notion of a "public forum" in analyzing the right to assemble or demonstrate on public property, the Court's decisions suggest that the validity of a time, place, or manner restriction depends not only on its actual effect on speech but on the kind of government property involved—whether it is property that "in an open democratic society * * * [is] an important facility for public discussion" in which the citizen who is demonstrating "is exercising an immemorial right of a free man" (*id.* at 11-13).

Specifically, the Court's decisions seem to divide public places into three categories. The first category consists of the true public forums, those areas—notably streets and parks—that have historically been open to citizens to use for expressive actvities: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions" (*Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)). See also *Heffron* v. *International Society for Krishna Consciousness, Inc.*, *supra*, 452 U.S. at 655 (suggesting that a state fair is a "limited public forum"). The Court has, therefore, scrutinized limits on access to streets and parks more closely. See, *e.g.*, *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 152-153 (1969); *Cox I*, *supra*.

Streets and parks, however, can easily accommodate many forms of expression, and such activities as picketing, leafleting and demonstrating are not in-

compatible with the uses to which such public property is lawfully dedicated. See *United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*, 453 U.S. at 129-131 & n.6. A second category of public property serves more specialized purposes; in these areas, the public right of access is reduced and the government's "special interests * * * in overseeing the use of its property" (*Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 540) are stronger. Accordingly, in these areas the government has greater latitude to prohibit expression that is "basically incompatible with the normal activity of a particular place at a particular time." *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). For example, noisy demonstrations may be prohibited outside schools (*id.* at 117-121) or inside libraries (*id.* at 116; see also *Brown* v. *Louisiana*, 383 U.S. 131 (1966)); demonstrators may be barred from jail grounds (*Adderley* v. *Florida*, 385 U.S. 39 (1966)); and unstamped mailable matter may be barred from a mailbox (*United States Postal Service* v. *Council of Greenburgh Civic Associations*, *supra*). Although the difference is one of degree, the Court has suggested that such areas are not to be regarded as "public forums" (see 453 U.S. at 128-133); the citizen's "First-Amendment easement" (Kalven, *supra*, 1965 Sup. Ct. Rev. at 13) is narrowly limited, and the government may impose more stringent regulations, as long as the regulations are reasonable and do not differentiate on the basis of the content of speech. 453 U.S. at 131 n.7, 132-133.

In the third category of public places, the government's interests are of such a nature and magnitude that it may even regulate speech on the basis of its content, if it has a reasonable basis for its distinctions. The Court has stated emphatically that these

areas are not public forums. Thus, for example, prison authorities may restrict expression related to a prisoners' union (*Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 133-136 (1977)), and the government may restrict political expression on a military base (*Greer* v. *Spock*, 424 U.S. 828, 838 n.10 (1976)). See also *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974) (public transportation); *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 514 n.19 (1981) (plurality opinion). Under *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 537-540, these must be regarded as distinctions based on the content of expression. See *Carey* v. *Brown*, *supra*, 447 U.S. at 462 n.6.

Cox II establishes that courthouse grounds are not a public forum; arguably, they fall into the third category. In *Cox II*, the Court ruled that a peaceful protest march could be prohibited from approaching a courthouse (379 U.S. at 560-566). A similar march would very likely have been constitutionally protected elsewhere on the public streets (see *Shuttlesworth* v. *Birmingham*, *supra*, 394 U.S. at 152-153; *Gregory* v. *Chicago*, 394 U.S. 111 (1969)); indeed, shortly before its decision in *Cox II*, the Court reversed the convictions of protesters who had held a "strikingly similar" (*Cox I*, *supra*, 379 U.S. at 544) march on the grounds of a state capitol. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); see Kalven, *supra*, 1965 Sup. Ct. Rev. at 4-6. Thus, *Cox II* settled with "unequivocal clarity * * * the point that no matter who you are or what your grievance, you cannot picket the courthouse." Kalven, *supra*, 1965 Sup. Ct. Rev. at 10. Moreover, as we will explain (see page 30, *infra*), the statute upheld in *Cox II* is in many respects akin to a classification of speech on the basis of content.

Accordingly, courthouses cannot be classified with streets and parks as public forums, or even with such places as the area near a school, where the citizen's right of access, while subject to significant regulation, is not wholly insubstantial. Instead, near a court, the government's power to regulate expressive activity is at its greatest, and the citizen's right to demonstrate is significantly diminished. The restriction imposed by Section 13k is therefore minimal both because it has only a slight practical effect on protected expression and because it does not regulate the kind of property the use of which "for purposes of assembly * * * has, from ancient times, been a part of the privileges * * * of citizens" (*Hague* v. *CIO*, *supra*, 307 U.S. at 515).

B. Section 13k Promotes Important Government Interests and Is Not Excessively Restrictive

1. Within the Supreme Court Grounds, Section 13k Protects Against Real or Apparent Interferences With the Judicial Process in a Way Superior to 18 U.S.C. 1507

a. The court of appeals acknowledged the government's unusually strong interests in regulating picketing and demonstrating near federal courts (J.S. App. 20a-21a), and it did not deny that Section 13k promotes these interests. Congress has an interest, first, in "protecting [the] judicial system from the pressures which picketing near a courthouse might create. * * * [A] legislature has the right to recognize the danger that some judges * * * and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms * * *." *Cox II*, *supra*, 379 U.S. at 562-565.

Perhaps even more important, so far as Section 13k is concerned, is the government's interest in "protect[ing] the judicial process from being misjudged

in the minds of the public." *Cox II*, *supra*, 379 U.S. at 565. A decision rendered shortly after a well-publicized demonstration on the issue involved may be perceived as a reaction to the demonstration; Congress "may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *Ibid.*[7]

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[7] The demonstrators in *Cox II* urged that such cases as *Bridges* v. *California*, 314 U.S. 252 (1941), and *Pennekamp* v. *Florida*, 328 U.S. 331 (1946), barred the government from offering this reason in support of a restriction on picketing near the courthouse. See 379 U.S. at 563-564. Those cases held that the First Amendment prohibited "the contempt power [from being] used to punish out-of-court comments concerning pending cases or grand jury investigations" (*Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978); see also *Craig* v. *Harney*, 331 U.S. 367 (1947); *Wood* v. *Georgia*, 370 U.S. 375 (1962)). The Court in *Cox II* rejected this argument for two reasons. First, it noted that it was dealing not with the undefined common law contempt power but with "a statute narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process" (379 U.S. at 563-564). As we explain (pages 28-32, *infra*), one of the principal virtues of Section 13k is that it is significantly narrower and more specific than the statute upheld in *Cox II*.

Second, the Court in *Cox II* recognized that demonstrating near a courthouse poses greater dangers, and can be regulated with less cost to First Amendment values, than the publication of information and views. See 379 U.S. at 564. Whether or not a sharp line can be drawn between pure speech and expressive conduct, it is undeniable that demonstrators—who use their physical presence to convey their message in a forceful fashion—present different regulatory concerns from those who use only words. See, *e.g.*, *Cox I*, *supra*, 379 U.S. at 555; *Greer* v. *Spock*, *supra*, 424 U.S. at 849 (Powell, J., concur-

The importance of protecting the judiciary against actual intimidation need not be elaborated. See, *e.g.*, *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923). Protecting against the appearance that popular pressures have affected a decision is also fundamental to the judicial process. See *Offutt* v. *United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). As Judge MacKinnon noted in his dissent (J.S. App. 33a), even a judge who is in fact impartial must disqualify himself if "his impartiality might reasonably be questioned." 28 U.S.C. 455(a). Indeed, the government's interest in avoiding the appearance of improper political influence is of such importance that it can justify restrictions that are based on the *content* of speech and that discriminate against political expression—even though restrictions based on content are the most suspect (see *Hudgens* v. *NLRB*, 424 U.S. 507, 520 (1976), quoting *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972)) and political speech is at the core of the expression protected by the First Amendment (see *Brown* v. *Hartlage*, No. 80-1285 (Apr. 5, 1982), slip op. 7, quoting *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966)).

In *Greer* v. *Spock*, *supra*, the Court held that political speeches, rallies, and leafleting could be prohibited on a military base—even though other civilian expressive activities were allowed—because of the importance of keeping the military "insulated from

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ring) ("[F]ace-to-face persuasion * * * has an immediacy and impact not found in reading papers and watching television."). Moreover, a ban on publication suppresses expression totally, at least for a period of time. By contrast, Section 13k not only permits demonstrations to take place, but allows them to be held at locations that scarcely diminish their impact.

both the reality *and the appearance* of acting as a handmaiden for partisan political causes or candidates." 424 U.S. at 839 (emphasis added). See *id.* at 846 (Powell, J., concurring) ("There is * * * a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that * * * undue military influence on the political process is not even a remote risk."). Similarly, in *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld the Hatch Act prohibition against active participation by federal civilian employees in political campaigns or political management,[8] in part because "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." 413 U.S. at 565. In *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), the Court upheld a regulation that prohibited political advertising, but not advertising with a different content, in a city's public transit system; one of the reasons given by the plurality was the need to avoid the appearance of political favoritism by the city. *Id.* at 304. The statute approved by *Cox II* is itself akin to a regulation based on the content of speech. See page 30, *infra*.

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[8] 5 U.S.C. 7324(a)(2). This too is a restriction on content; it differentiates between political speech and speech on other subjects. See generally *Consolidated Edison Co.* v. *Public Service Commission*, *supra*, 447 U.S. at 536-540; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. Chi. L. Rev. 81, 94-95 (1978).

Plainly, by preventing demonstrators from closely approaching the Court, Section 13k directly protects against the appearance that political pressure can influence a judicial decision. If similar interests were substantial enough to sustain the measures in *Greer*, *Letter Carriers*, *Lehman*, and *Cox II*, they are necessarily sufficient to support Section 13k. That statute applies only to the Nation's highest court, and accordingly the government's interest in fostering the appearance of impartiality and due proces of law is at its zenith; the statute achieves its purposes without classifying speech on the basis of content or discriminating against political speech; and, as we have explained, the statute imposes only a slight burden on protected expression.[9]

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[9] We recognize, of course, that a single leafleter or demonstrator—or, for that matter, most small crowds or a well-behaved large crowd—will usually not create an actual danger of real or perceived intimidation of the judiciary. But the court of appeals explicitly struck down Section 13k on its face, not just as applied to appellees, thus holding that it had no constitutional applications. See J.S. App. 27a. Moreover, the Court upheld the regulation at issue in *Greer* even though an occasional political leafleter on a military installation is most unlikely to undermine the "strong tradition, now nearly two centuries old, of maintaining noninvolvement by the military in politics" (424 U.S. at 845 (Powell, J., concurring)). In *Cox II*, the Court did not consider whether the demonstration in question actually created the dangers of real or apparent intimidation of the state judges; nor did it suggest that a statute directed at these evils could not constitutionally be applied to a small and obviously innocuous group of demonstrators.

The judgment whether a particular group of demonstrators actually threatens the interests identified in *Cox II* must take into account not only the size of the group, but the nature of its actions and, perhaps most important, the context in which the demonstration occurs. But there is significant value in

b. The court of appeals did not deny that Section 13k promotes these important interests in the integrity of the judicial system. Instead, the court struck down Section 13k because, it asserted (J.S. App. 22a), these interests are "fully addressed" by 18 U.S.C. 1507. We know of no reason—and the court of appeals suggested none—to believe that the Constitution prohibits Congress from enacting two statutes that address the same problem in overlapping ways. See *United States* v. *O'Brien*, 391 U.S. 367, 380 (1968) ("[I]t has never been suggested that there is anything improper in Congress' providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest.").[10] The court of appeals must, therefore, have meant that Section 13k is excessively restrictive because, unlike Section 1507, it is not limited to actions done "with the intent of influencing" the Supreme

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reducing the discretion allowed to officials administering statutes that affect First Amendment rights. Therefore, as we explain (pages 28-32, *infra*), when a legislature has expressed a considered judgment that, in order to protect certain interests, expression should be regulated in a particular, content-neutral fashion that does not greatly burden First Amendment rights, and the regulation leaves only the minimum discretion to the administering officials, the courts should not lightly reject the legislature's solution.

[10] The Court has occasionally reasoned that other legislation in an area reveals that the legislature was not actually concerned to advance the objectives proffered as justifications for the challenged restriction. See, *e.g.*, *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 75 (1981); *Carey* v. *Brown*, *supra*, 447 U.S. at 465; *Eisenstadt* v. *Baird*, 405 U.S. 438, 448-452 (1972). But no aspect of 18 U.S.C. 1507 undermines the justifications we have offered for Section 13k; on the contrary, Section 1507 shows, if anything, the significance Congress attaches to the interests promoted by both statutes.

Court (see J.S. App. 23a). The court's reasoning is flawed in several respects.

First, the court of appeals misconceived the purpose of the specific intent requirement in Section 1507. That requirement does impose an important limitation on the statute's prohibition, but the limitation is irrelevant to demonstrations at the Supreme Court. In *Cox II*, the Court suggested that the requirement of an intent to influence the court was necessary to the constitutionality of a prohibition on courthouse picketing, but only because that requirement protects such expression as "picketing to protest the actions of a[n] * * * official * * * completely unrelated to any judicial proceedings, who just happen[s] to have an office located in the courthouse building" (379 U.S. at 567). Section 13k applies only to the Supreme Court, which houses only the Court and related offices. Nothing in *Cox II* suggests that a specific intent requirement would be needed to sustain a prohibition against demonstrating at a building that houses only a court.

Second, the court of appeals suggested that, because it omits a specific intent requirement, Section 13k impermissibly restricts demonstrations that are unrelated or only indirectly related to the work of the Court. But as we have explained, the impact of Section 13k on such activities is minimal; the speakers need only move across the street, or perhaps into the street directly in front of the Court. In view of the tangential relationship between their speech and the Court, this is unlikely to have a substantial effect on the effectiveness of their speech. Moreover, there are unlikely to be many demonstrations at the Court that are wholly unrelated to the Court's work, both because the Court deals with a wide range of issues of public importance and because those interested in

demonstrating about matters unrelated to the Court's business are likely to choose other, more suitable, sites in Washington.

Finally, limiting Section 13k to expressive activities intended to influence the Court would have significant costs—including costs to the values protected by the First Amendment. The court of appeals failed to recognize, for example, that because of its intent requirement Section 1507 only imperfectly protects the government's interests in preventing the actual or perceived intimidation of the judiciary. Some demonstrations may be *seen* as influencing the Court—and therefore be properly subject to regulation—even though it cannot be shown that the demonstrators *intended* to influence the Court. The issues with which the Court is concerned are often the subject of debate in the other branches of government and in society generally; demonstrators addressing such an issue may want to use the Court as a setting while subjectively agreeing that the Court should be guided only by the law. Their subjective intention, however, will often not be apparent to members of the public, and a decision on the issue following shortly after the demonstration may be seen as a reaction to the demonstration.

More important, including a specific intent requirement in Section 13k "would actually increase opportunities for the content-based censorship disfavored by the First Amendment" (*New York* v. *Ferber*, No. 81-55 (July 2, 1982), slip op. 1 (O'Connor, J., concurring)). In cases dealing with the regulation of speech in public places, this Court has repeatedly emphasized that official discretion is undesirable, and is to be limited so far as possible by "narrowly drawn, reasonable and definite standards" (*Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951); see, *e.g.*, *Shut-*

tlesworth v. *Birmingham*, *supra*, 394 U.S. at 150-153 & n.2 (citing cases); *Kunz* v. *New York*, 340 U.S. 290, 294 (1951); *Lovell* v. *Griffin*, 303 U.S. 444, 451 (1938); Cox, *The Supreme Court, 1979 Term—Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 40-41 & n.165 (1980), citing *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) ("[A] man may not be punished for words or for a street demonstration under a * * * rubric * * * that leaves wide discretion to the police, public prosecutors, and judges * * *."). Jurors, too, should not be invited to make discretionary judgments when First Amendment rights are at stake. See *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974); *Herndon* v. *Lowry*, 301 U.S. 242, 261-263 (1937); Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 526-529 (1970).

Officials administering a statute that makes the legality of expression depend on whether the speaker intended to influence a court do not have the uncontrolled discretion that this Court has condemned; but they undeniably have far more discretion than they would have in administering Section 13k. It will often be difficult to distinguish between a speaker who is attempting to influence the Court and one who is only attempting to influence the public or to express himself.[11] Many highly controversial social issues that frequently inspire demonstrations are repeatedly implicated in the Court's decisions, and can be expected to come before the Court at some time in the future; it will be difficult to determine whether demonstrations about such issues are intended to influence the

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[11] For example, Judge MacKinnon presented a substantial argument that appellee Grace, in protesting Section 13k, was attempting to influence either the Court or court officers (J.S. App. 35a n.3).

Court. And it will not always be clear whether a demonstration protesting a decision of the Court should be regarded as an attempt to influence the future course of the Court's decisions.

These difficulties are aggravated because an "intent of influencing" requirement has many of the characteristics of a restriction on the content of speech. Necessarily, the content of the expression will be the primary, and often the conclusive, evidence of the speaker's intent. See *Cox II*, *supra*, 379 U.S. at 567. Indeed, if a speaker's intent to influence the Court could not be inferred from his statements and the actions associated with them, his intent would not be relevant to the objectives of preventing the real or perceived intimidation of judges. Thus, a specific intent requirement demands that officials make discretionary decisions based on the content of expression. This is precisely the allocation of powers that the Court has repeatedly enjoined legislatures to avoid.

Cox II held that these significant costs to First Amendment values are justified when an intent requirement is needed to protect demonstrations directed at a non-judicial official who happens to be located in a courthouse. But as we have explained, no such purpose would be served by applying an intent criterion to demonstrations at the Supreme Court. Accordingly, Congress chose to reduce discretionary enforcement by legislating, for the Supreme Court grounds, the more "explicit standards" of Section 13k, instead of a statute with an intent criterion that, to a greater degree, " 'delegates [decisions] * * * to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application'."

(*Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, No. 80-1681 (Mar. 3, 1982), slip op. 8, quoting *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108-109; see *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Cantwell* v. *Connecticut*, *supra*, 310 U.S. at 305-306).[12]

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[12] These interests in support of Section 13k are substantial, even though Congress has also enacted a statute, Section 1507, that permits such discretionary judgments. Section 13k does effectively limit the discretion of officials within the Supreme Court grounds; within that small area, they are charged with enforcing Section 13k, and they cannot ignore it and apply only 18 U.S.C. 1507. In order to defend against a claim of discriminatory enforcement, for example, the responsible officials would have to show that they reasonably implemented Section 13k, not just Section 1507.

Similarly, it might be argued that Section 13k cannot possibly be more protective of First Amendment interests than a similar statute with a specific intent requirement, because the latter statute would necessarily permit more expression on the Supreme Court grounds. But the First Amendment is not a simplistic requirement that the gross amount of expressive activity in society be maximized; the First Amendment, as this Court has developed its principles, is a more subtle regulation of the relationship between the citizen and the government. One of those principles is that administrative discretion, and content-based distinctions, are to be avoided if possible. The Court has repeatedly refused to allow a discretionary regime, or a distinction based on content, even when the alternative may have been a ban on all expression. See, *e.g.*, *Carey* v. *Brown*, *supra*, 447 U.S. at 466-467; *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Cox I*, *supra*, 379 U.S. at 555-558. See generally *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow * * * officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

Finally, in addition to substantially reducing the discretion of administrative officials, Section 13k gives "the Court * * * the benefit of a narrow, precise * * * statute representing a legislative judgment that in this one limited area picketing is improper" (Kalven, *supra*, 1965 Sup. Ct. Rev. at 32). Under this Court's decisions, such a considered legislative judgment, reflecting an assessment of the facts and a weighing of the interests bearing on a particular problem, is entitled to deference even in the First Amendment area. "Where First Amendment interests are affected, a precise statute 'evincing a legislative judgment that certain specific conduct be * * * proscribed' * * * assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109 n.5, quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1963). See *United States* v. *Robel*, 389 U.S. 258, 272-282 (1967) (Brennan, J., concurring); *Garner* v. *Louisiana*, 368 U.S. 157, 200-203 (1961) (Harlan, J., concurring). As Professor Kalven has explained, in a passage this Court has cited (Kalven, *supra*, 1965 Sup. Ct. Rev. at 32 (footnotes omitted); see *Grayned* v. *City of Rockford, supra*, 408 U.S. at 109 n.5):

> The point is not simply that a precise statute avoids vagueness or reduces the chances of unequal administration or even that by leaving other places and times available it presents the Court with only a modest restriction. It is rather that, in the difficult balancing process these cases force upon the Court, it has the benefit of the counsel of a deliberate, specific, and relevant legislative judgment.

2. *Congress May Properly Determine That the Supreme Court Serves Symbolic Purposes Incompatible with the Manner of Public Expression Prohibited by Section 13k*

a. Congress plainly has the power to determine that certain areas and structures owned by the government will serve as national monuments and memorials, and that public buildings will serve symbolic as well as practical functions. See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U.S. at 425, 477-478 & n.42 (1977); *Roe* v. *Kansas*, 278 U.S. 191 (1929); *United States* v. *Gettysburg Electric Ry.*, 160 U.S. 668 (1896). Symbolic practices are common in government, and particularly in the courts; while their practical effects are difficult to specify, they help maintain important rules and traditions and enhance values consistent with the rule of law. As the court of appeals acknowledged, Congress may decide, for example, that the symbolic mission of a court requires a certain architecture (see J.S. App. 24a) or warrants inscribing a secular motto on the building.

In some circumstances, a restriction on public expression will also be reasonably ancillary to the exercise of this power. See *Smith* v. *Goguen*, *supra*, 415 U.S. at 587 (White J., concurring) ("There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlying it with words * * *."). Public expression, particularly if it involves conduct—such as holding a placard, parading, or distributing leaflets—can affect the government's ability to imbue a setting with a symbolic meaning. See *Greer* v. *Spock*, *supra*, 424 U.S. at 844 (Powell, J., concurring) ("symbolic incompatibility" between military life and political leatfleting and rallies on a military base). It is true

that symbolic concerns are more intangible than the interests in public safety and convenience that generally justify place and manner regulations; in addition, Congress necessarily and appropriately has some discretion to define the symbolic functions of a place and therefore the extent to which public expression is inconsistent with those functions. But this Court has never suggested that only objectively defined interests can justify a restriction on speech, and in a variety of contexts it has recognized the importance of symbolic and intangible interests that cannot be precisely quantified. See, *e.g.*, *Cabell* v. *Chavez-Salido*, No. 80-990 (Jan. 12, 1982), slip op. 14-15 (symbolic and educational roles of probation officer justify citizenship requirement); *Hodel* v. *Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 279-280 (1981) (natural beauty); *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974) ("family values, youth values, and the blessings of quiet seclusion and clean air"). Thus, for example, a national cemetery is properly tranquil, sacrosanct, and removed from the commotion of ordinary life. It is surely reasonable for Congress to decide that, in order to promote these symbolic objectives, it will restrict or even prohibit public demonstrations in cemeteries.

In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981), the Court held that esthetic interests can justify restrictions on speech, even though those interests are intangible and are defined in large measure by a legislature's "necessarily subjective" judgment that "def[ies] objective evaluation * * *." *Id.* at 510 (plurality opinion); see *id.* at 530 (Brennan, J., concurring); *id.* at 549-550 (opinion of Stevens, J.) (discussing graffiti on public buildings); *id.* at 560 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dis-

senting); see also *Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954). The government's power to promote symbolic interests by regulating expression in public buildings and areas follows a fortiori from *Metromedia*. *Metromedia* involved a regulation of private property, while the power to determine that government buildings and grounds will serve symbolic functions implicates "the special interests of [the] government in overseeing the use of *its* property" (*Consolidated Edison Co.* v. *Public Service Commission*, 447 U.S. 530, 540 (1980) (emphasis added); see *Spence* v. *Washington*, 418 U.S. 405, 408-409, 411 (1974)). Moreover, the promotion of esthetic interests has only recently been fully accepted as a legitimate end of government (see *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1447-1450 (1978)), while we doubt that the government's power to establish national monuments has ever been seriously disputed.

We recognize that there must be some limits on the power to regulate expressive activities for symbolic purposes. We do not suggest, for example, that Congress could declare all of the Nation's capital to be a symbol of tranquillity, and ban all demonstrations within its boundaries. Courts must ensure that a regulation does not seriously impair First Amendment rights, and to some extent they may inquire into the appropriateness and reasonableness of Congress's judgment that the symbolic purpose to which an area is dedicated is inconsistent with a particular form of public expression. By the same token, however, the First Amendment does not require that *every* public place be a monument only to the "verbal tumult, discord, and even offensive utterance" (*Cohen* v. *California*, 403 U.S. 15, 24-25 (1971)) that are properly protected throughout much of society. Accordingly, when Congress makes a reasonable and ap-

propriate decision to limit public expression at a certain site in order to preserve its symbolic character, and that decision does not place excessive burdens on expression, the legislative judgment should not be overturned.

b. In enacting Section 13k, Congress made such a decision; it determined to treat the building and grounds of the Nation's highest court as a symbol of the characteristic virtues of the judicial process—calm deliberation and reflection, informed by vigorous debate within the courtroom but free from outside pressure and political controversy. Section 13k, as the court of appeals acknowledged (J.S. App. 22a-23a), is one provision of a statute intended to preserve "the dignity which should surround the Supreme Court of the United States and the building and grounds which house it." S. Rep. No. 719, 81st Cong., 1st Sess. 2 (1949); see H.R. Rep. No. 814, 81st Cong., 1st Sess. 2 (1949).[13] As we have explained, Section 13k serves these purposes at little or no cost to protected expression. It has no effect at all on the constitutional rights of those who are attempting to influence the Court; its practical effect on other speakers' rights is very limited; and it does not bar access to a "public forum" where citizens may legitimately claim broad expressive rights. The Court has consistently upheld restrictions of this limited nature when they promoted significant government interests. See pages 14-21, *supra*.

Moreover, it was appropriate for Congress to choose the building and immediate surroundings of the Su-

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[13] Other provisions of the statute of which Section 13k is a part (Act of Aug. 18, 1949, ch. 479, 63 Stat. 616) prohibit solicitations and commercial advertisements in the Court or on its grounds (40 U.S.C. 13h); discharging firearms, setting fires, or uttering loud and abusive language (40 U.S.C. 13j); and climbing on or injuring statues, walls, fountains, or plants (40 U.S.C. 13i).

preme Court to dedicate as a symbol of the "calmness and solemnity of the courtroom" (*Cox II*, *supra*, 379 U.S. at 583 (opinion of Black, J.)) and the independence of the judicial branch from political pressure, and to make the judgment that public demonstrations are "basically incompatible with" these symbolic purposes (*Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 116).[14] Every court—unlike the elected branches of government—should be free from political pressure. "It is a serious accusation to charge a judicial officer with making a politically motivated decision. By contrast, it is to be expected that a legislator will vote with due regard to the views of his constituents." *Clements* v. *Fashing*, No. 80-1290 (June 25, 1982), slip op. 10 (plurality opinion).[15] But the Supreme Court, for many reasons, "holds a unique place" (A. Meiklejohn, *Free Speech* 32 (1948)). It

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[14] Other symbolic uses of the Court might also have been appropriate; the court of appeals, for example, apparently would have preferred to treat the Court as a monument to the virtues of robust public expression. See, *e.g.*, J.S. App. 24a, 26a. But as long as the First Amendment is not violated, this choice about the Nation's symbols and monuments is for Congress, not a court, to make.

[15] Thus, as we noted (page 20, *supra*), it is well established that demonstrations that may be constitutionally protected near a legislature are impermissible near a courthouse. Compare *Cox II*, *supra*, with *Edwards* v. *South Carolina*, *supra*. See *Jeannette Rankin Brigade* v. *Chief of Capitol Police*, 342 F. Supp. 575, 584 (D.D.C.) (three-judge court), aff'd, 409 U.S. 972 (1972) (demonstrations on Capitol grounds are permissible although similar demonstrations near a courthouse are not, because Congress, unlike a court, is appropriately subject to public opinion); *A Quaker Action Group* v. *Morton*, 516 F.2d 717, 725 (D.C. Cir. 1975) (White House area is a "unique situs" for the exercise of First Amendment rights).

is the single court peculiarly well suited to act as a symbol for all others. Congress could properly recognize that the Supreme Court's constitutional status, and the wide impact of its decisions, make it the focus of aspirations for an independent judiciary that resists popular pressure and decides cases according to reason and law.

> [T]he Supreme Court as a legitimating force in society * * * casts a * * * larger spell. With us the symbol of nationhood, of continuity, of unity and common purpose, is, of course, the Constitution * * *. The utility of such a symbol is a commonplace. * * * [And] it has in large part been left to the Supreme Court to concretize the symbol of the Constitution.

A. Bickel, *The Least Dangerous Branch* 31 (1962). It is, therefore, not an overstatement to say that no other building housing an operating institution of government is more appropriately treated as a symbol of orderly, impartial process and freedom from outside influence.[16]

Section 13k reflects a reasonable conclusion that requiring demonstrators to move from the grounds of the Court to a nearby area—while only a gesture so far as their exercise of First Amendment rights is concerned—is a gesture that symbolizes the independence of the Supreme Court, and by implication all courts, from the demands of insistent popular opinion.

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[16] **The public interest in fostering the appearance of justice is strongest in regard to the Supreme Court, which stands at the apex of our judicial system. A lower court judgment that appears to be influenced by extraneous considerations may be corrected on appeal. There is no appeal from this Court.**

There is no sufficient reason to deny Congress the power to pursue these symbolic objectives in a way that has so slight an impact on protected expression.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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